



1001 Marina Village Parkway, Suite 200  
Alameda, California 94501  
TELEPHONE: (510) 337-1001  
FACSIMILE: (510) 337-1023  
David A. Rosenfeld  
drosefeld@unioncounsel.net

STEWART WEINBERG  
DAVID A. ROSENFELD  
WILLIAM A. SOKOL  
BLYTHE MICKELSON  
BARRY E. HINKLE  
ANTONIO RUIZ  
MATTHEW J. GAUGER  
ASHLEY K. IKEDA  
LINDA BALDWIN JONES  
PATRICIA A. DAVIS  
ALAN G. CROWLEY  
KRISTINA L. HILLMAN  
EMILY P. RICH  
BRUCE A. HARLAND  
CONCEPCIÓN E. LOZANO-BATISTA  
CAREN P. SENCER  
ANNE I. YEN  
KRISTINA M. ZINNEN  
JANNAH V. MANANSALA  
MANUEL A. BOIGUES  
KERIANNE R. STEELE  
GARY P. PROVENCHER  
EZEKIEL D. CARDER  
MONICA T. GUIZAR  
LISL R. SOTO  
JOLENE KRAMER

February 19, 2019

## VIA ELECTRONIC FILING

Ms. Molly Dwyer, Clerk of the Court  
Office of the Clerk  
Ninth Circuit Court of Appeals  
95 Seventh Street  
P.O. Box 193939  
San Francisco, CA 94119

ALEJANDRO DELGADO  
CAROLINE N. COHEN  
XOCHITL A. LOPEZ  
CAITLIN E. GRAY  
TIFFANY CRAIN ALTAMIRANO  
RYAN B. KADEVARI  
DAVID W.M. FUJIMOTO  
ADAM J. THOMAS  
LIZET A. RAMIREZ  
PAUL K. PFEILSCHIEFER  
ALEXANDER S. NAZAROV  
ERIC J. WIESNER  
THOMAS I.M. GOTTHEIL  
JERRY P.S. CHANG  
ANDREA C. MATSUOKA  
BENJAMIN J. FUCHS  
CHRISTINA L. ADAMS

### OF COUNSEL

ROBERTA D. PERKINS  
NINA FENDEL  
TRACY L. MAINGUY  
ROBERT E. SZYKOWY  
ANDREA K. DON  
LORI K. AQUINO  
SHARON A. SEIDENSTEN

• Admitted in Hawaii  
• Also admitted in Nevada  
• Also admitted in Illinois  
▶ Also admitted in New York and Alaska  
\* Also admitted in Florida  
• Also admitted in New York  
• Also admitted in Minnesota

**Re: *NLRB v. International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 229*, Case No. 17-73210**  
**Oral Argument Heard on February 15, 2019**  
**Citation to Supplemental Authority Pursuant to FRAP 28(j)**  
***Construction and General Laborers' Union No. 330, et al. v. Town of Grand Chute*, United States Court of Appeals for the Seventh Circuit Case No. 18-1739**

Dear Ms. Dwyer:

On February 14, the day before oral argument, the Seventh Circuit decided the above-referenced case.

This case involved “Scabby the Rat” which is an inflatable creature used by a labor union as part of labor speech.

The Court said:

As we acknowledged in our earlier opinion, there is no doubt that a union’s use of Scabby to protest labor practices is a form of expression protected by the First Amendment.

Op. p. 11.

The Court also noted:

We may uphold the law that restricts even protected speech in a public forum if the restriction is content neutral, narrowly tailored to serve a significant governmental interest and leaves open ample alternative ways to communicate the desired message.

*Id.*

This Court has similarly applied a form of intermediate scrutiny to labor speech in a public forum. *Eagle Point Educ. Assoc. v Jackson Cty. Sch. Dist.*, 880 F.3d 1097, 1106-1107, (9th Cir.).

The NLRB will correctly point out that neither case applies either form of scrutiny to the National Labor Relations Act's restriction on speech.

This Court did not need to reach that issue in *Overstreet v United Bhd. Of Carpenters*, 409 F.3d 199 (9th Cir. 2005) because the Court found the expressive conduct of bannerling not to be picketing in a constitutional avoidance analysis and thus it was not prohibited by the Act. Such constitutional avoidance is not available here.

This recent decision of the Seventh Circuit is directly relevant to the necessity of applying either strict scrutiny or intermediate scrutiny to the labor speech involved in this case which did not involve any conduct, such as the use of an inflatable critter or a picket sign. The speech in this case involved in the words of the Board was not conduct but only "appealing" to employees (used four times) (ER. 6). Cf. *NLRB v. Ironworkers Local 433*, 891 F.3d 1182, 1187 (9th Cir. 2018) (statute regulates conduct rather than content).

Sincerely,

/s/ David A. Rosenfeld

David A. Rosenfeld

DAR:kk

opeiu 29 afl-cio(1)

144454\1011316

cc: See attached Proof of Service

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on February 19, 2019, I electronically filed the foregoing **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 19, 2019.

/s/ Karen Kempler

Karen Kempler